Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

DR. RICHARD ANTHONY KAMINSKY, D.O.,
Petitioner,

v.

SAINT LOUIS UNIVERSITY SCHOOL OF MEDICINE,
Respondent.

On Petition for Certiorari to the United States Court Of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the District Court failed to construe plaintiff's *pro se* complaint and summary judgment liberally, denying summary judgment based on alleging that a statement of uncontroverted facts was not filed in a timely manner and thus "procedurally flawed", citing their Local Rule 4.01(E) and that extensive documents submitted did not have accompanying affidavits, in opposition to Fed. R. Civ. P. 56(c)(e), as sole basis?

2) Whether the District Court and Eighth Circuit erred in granting Respondent Saint Louis University School of Medicine summary judgment based on finding alleged reasons for not rehiring Petitioner Dr. Kaminsky are nondiscriminatory, not pretextual, that no causal link between discrimination and termination existed as the Eighth Circuit cited cases that support questioning whether Congress created a private right of action in IRS cases where they state that they "find no reversible error of fact of law" in an ADA and employment discrimination case?

3) Whether the District Court and Eighth Circuit erred in failing to find a prima facie case of employment discrimination in regard to Petitioner Dr. Kaminsky's claims of disability and religious discrimination, and retaliation for filing an EEOC charge?

4) Whether the Courts erred in finding the religious discrimination, hostile work environment, failure to promote and wrongful termination claims time-barred based on the "continuous violations doctrine?"

LIST OF PARTIES

1) SAINT LOUIS UNIVERSITY SCHOOL OF MEDICINE, Defendant and Respondent.

2) DR. RICHARD A. KAMINSKY, D.O., Plaintiff and Petitioner.

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REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Review should be granted because of the Second Circuit Court of Appeals decision to reverse the district court in it's decision to dismiss a plaintiff's complaint in an ADA complaint conflicts with the opinion of the Eighth Circuit Court of Appeals.

II. Review should be granted because Respondent's "nondiscriminatory reasons" given for not rehiring Petitioner were either non-employment related, a result of the hostile work environment imposed, or not admissible into evidence. Petitioner also maintains that there is a factual dispute for these reasons and that Respondent shifted from one reason to another.

III. Review should be granted because both the District Court and Eighth Circuit decisions conflict with this Court's opinion as in *Kolstad v. American Dental Ass'n* that to recover punitive damages under Title VII and ADA that a plaintiff does not have to show "egregious" discrimination but just that the employer possessed "a positive element of wrongdoing."

IV. Review should be granted because both the District Court's and Eighth Circuit's finding that the religious discrimination, hostile work environment failure to promote and wrongful termination claims are "time barred"conflict with the Ninth Circuit's finding that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act *must* also be considered for the purposes of liability.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Seventh Amendment To The United States Constitution

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

41 U.S.C. § 2000e-2(a)(2000)

It shall be an unlawful employment practice for an employer-
1. to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national original origin; or;
2. to limit, segregate, or classify his employees or applications for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(j) The term "religion" includes all aspects of religious observance an practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 1981 note

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace.

42 U.S.C. § 1981a(c)(1)(2000)

Jury trial:
If a complaining party seeks compensatory or punitive damages under this section -
1. any party may demand a trial by jury...

42 U.S.C. § 2000e-2(m)(2000)

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices
Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. §12102(2) and 42 U.S.C. § 12112(b)

The ADA's definition provides:

the term 'disability' means, with respect to an individual--
(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

42 U.S.C. §12114(b)(3)

Rules of Construction: "is erroneously regarded as engaging in such use, but is not engaging in such use."

42 U.S.C. §12203(a)

Retaliation- No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 121112(b)(B)

Covers persons who may not have an impairment that substantially limits a major life activity but who have a history of, or have been misclassifies as having, such a substantially limiting impairment as Congress has ruled in EEOC Sec 902.1(b).

Fed. R. Civ. P. 56(a)-(e)

Refers to affidavits, "if any", suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits."

Fed. R. of Evid. § 403

Rules to exclude relevant but unfairly prejudicial evidence in a civil case.

Fed. R. of Evid. § 404

Provides that character evidence is not admissible in a civil case to prove conduct.

EEOC Sec 902.1(b)

Persons who may not have an impairment that substantially limits a major life activity but who have a history of, or have been misclassifies as having, such a substantially limiting impairment still meet the requirements of the term "disability" under 42 U.S.C. § 121112(b)(B).

Local Rule 7-4.01 Motions and Memorandum

A memorandum in support of a motion for summary judgment shall have attached a statement of uncontroversial facts, set forth in a separately numbered paragraph for each fact, indicating whether each fact is established by the record, and, if so, the appropriate citations.

STATEMENT OF THE CASE

Facts Giving Rise To This Case

Dr. Kaminsky graduated from The University of Health Science College of Osteopathic Medicine (UHSCOM) now Kansas City University of Medicine and Biosciences (KCUMB), matched via the National Resident Matching Program (NRMP) match to Wake Forest University Baptist Medical Center (WFUBMC) in Winston-Salem, North Carolina, where Dr. Kaminsky was a Medical Examiner with the North Carolina Bureau of Investigation. While a resident at WFUBMC, Dr. Kaminsky grossed over 2,763 surgical pathology specimens, only 2,500 required by the ABP and 108 forensic and hospital autopsies, only 50 required by ABP, in his first two years. After successful completion of 24 months of anatomic and clinical pathology (AP/CP) residency at WFUBMC, a pathology residency certificate was issued by WFUBMC. Due to marital problems, Dr. Kaminsky transferred to SLU on July 1, 2000 to complete his remaining 24 months of the 48-month AP/CP residency. Saint Louis University School of Medicine (SLU) in St. Louis, Missouri, offered Dr. Kaminsky a graduate medical training contract, for his third year of pathology residency. Dr. Kaminsky successfully passed all three National Board of Osteopathic Medical Examiners (NBOME) COMLEX Boards and was issued a Certificate of Completion by the NBOME, Certificate number 35989; thereby allowing Dr. Kaminsky to obtain full medical licensure in all states in the United States of America. He obtained full medical licensure in both Missouri and Illinois and was issued certificates for both. Dr. Kaminsky's degrees, medical school diploma, residency certificates, licenses, evaluations, continuing medical education certificates, residency contracts, match

letters, and awards all appear in statement of uncontroverted facts filed with the district court. After being subjected to a hostile work environment fueled with religious discrimination for obtaining a divorce while working in a Catholic medical institution, being over documented with slanderous evaluations, which are variable even for the same pathology rotation, are illegible in many circumstances, defaming of his character, contradictory even on the same evaluation, not graded and unsigned in others. As a result of those proceedings he was placed in a "bad category" by Dr. Carole Vogler, pathology residency director and this was communicated to the rest of the pathology department, slandering Dr. Kaminsky's reputation within the pathology department and leaked outside to others generally within SLU hospital. As a result of this threatening, hostile work environment Dr. Kaminsky was asked to seek employee assistance counseling for lack of his agreement.

SLU engaged in tortuous interference with contract by "reappointing" Dr. Kaminsky with a third year (Level 3) contract, after his third year was in fact completed. This "reappointment" contract, was for only four months instead of the typical twelve months and this contract interference was the precipitate for additional interference with Dr. Kaminsky's progression to become a board-certified pathologist due to SLU's religious discrimination due to impending divorce and their intensified hostile work environment. Petitioner was removed from the surgical pathology rotations for slanderous, "trumped" up claims. Dr. Kaminsky was never sued or threatened with a malpractice lawsuit at SLU or since, and was issued a valid SLU pathology residency certificate for all months of employment at SLU. In fact, Dr. Kaminsky has never been threatened or sued for malpractice in any capacity at any medical

institution. Yet Dr. Kaminsky was made out to be an uncontrollable physician with alleged psychiatric symptoms that were referred to SLU's employment assistance program but were undiagnosed. Dr. Kaminsky stated time and time again that he did not like to discuss his personal "problems" and was dealing with this very effectively himself. Dr. Vogler insisted on paging him daily to discuss how his family situation was going. Dr. Kaminsky's coworkers became hostile and difficult to work with due to Dr. Vogler's impression of him for getting a divorce in a Catholic institution which in her eyes placed him into a "problematic category." Dr. Kaminsky would have remained calm and with appropriate demeanor had Dr. Vogler stopped the hostile harassing daily meetings as Dr. Kaminsky requested each time. These problems were caused by SLU. The hostile work environment was more than just "nit picking" and rudeness, it was real, threatening and interfered with Dr. Kaminsky's daily employment duties. When an employer interferes with ones contract tortuously and there are only a handful of other pathology residency positions in the state, they only fill their positions in July every year and most of their positions are filled by their own medical school graduates every year, one is left out in the cold to survive. This is what SLU did to Petitioner on October 31, 2001. At that point, Petitioner had to moonlight in emergency medicine and in urgent care to pay the bills.

Petitioner was employed with SLU, a Catholic Jesuit University in St. Louis, Missouri, in a resident physician pathology training program from July 1, 2000 to October 31, 2001. His employment history up until the time of dispute was exceptional, even working for major Fortune 500 corporations prior to entering medical school. However, upon obtaining a legal separation and then divorce after one

year as required by North Carolina law where the legal separation and divorce was granted in 2000, while at SLU he was subjected to a hostile work environment by constant daily pages from SLU's pathology residency program director and pathology co-chairman Dr. Carole Vogler, M.D. The pages led to demand of daily meetings with Dr. Vogler to discuss Dr. Kaminsky's family matters and then led to discussing progress in the residency program. After each demanded meeting with Dr. Vogler, Dr. Kaminsky's work environment was worsened and the hostility in the department became widespread and intensified, despite Dr. Kaminsky's willingness to conform to the work environment, with the exception of remaining married to his ex-wife. He made it very clear to Dr. Vogler that the daily meetings were unwanted, interfering and harassing. Despite the residency program's requirement to change rotations on a two month cycle, the problems followed Dr. Kaminsky and were present even on the first day of each rotation. The hostility by Dr. Vogler and Dr. Kaminsky's pathologist supervisors became so intense that it caused frustration and resentment. This led Dr. Vogler to demand Dr. Kaminsky contact SLU's employee assistance program ("EAP"). Dr. Kaminsky's employee evaluations were progressively downgraded, slow in being returned, some never returned, many illegible, some not signed, others not evaluated, and some with contradictory assessments even on the same evaluation. These became so poor that the evaluators began to also over document with typed pages instead of using the universal evaluation form. After continuous attempts by Dr. Kaminsky to correct the difficulties occurring with Dr. Vogler, it became clear that the problem was religious discrimination due to his legal separation and impending divorce. An "ad hoc" committee, consisting of all non-pathologists, professors of SLU's medical school, all of whom Dr. Kaminsky never even met

before, met with Dr. Kaminsky for less than a half-hour and made the decision of his fate in the SLU pathology residency program.

After completing his 3rd year of pathology residency, Dr. Kaminsky's contract was tortuously interfered with and only extended for a period of four months instead of twelve, at the same 3rd post-graduate year, instead of the 4th. He was not promoted to the fourth year. These four months were accepted with the agreement that if those four months were acceptable, his contract would be renewed for the remainder of the residency. Despite Dr. Kaminsky's increased performance during the final four months, his contract was not renewed and he was terminated on October 31, 2001.

As a result of that termination, Dr. Kaminsky had to resort to locum tenens work in local emergency departments and urgent care clinics to support himself, without the luxury of being board-certified, subjecting himself to the possibility of malpractice issues. Upon applying to other pathology residency programs during that time, Dr. Kaminsky had to request letters of recommendation from his former pathology supervising physicians at SLU. Dr. Kaminsky was informed either over the phone or at interviews with those other pathology residency programs that the letters written by SLU were poor, in bad taste, defaming, slanderous and were the reason those programs did not hire him to complete his pathology residency.

SLU has failed to rehire Dr. Kaminsky on three separate occasions, in 2004, 2005, and 2006 since he has departed employment with them. SLU has also retaliated against Dr. Kaminsky for informing them of his intent to file an EEOC charge for failure to rehire him in 2005.

Procedural History

Dr. Kaminsky filed a timely EEOC charge No. 280-2005-03207 for failure to rehire him based on discrimination against religion and disability for the 2004-2005 year and a "right to sue letter" was issued on June 15, 2005. Plaintiff filed a civil suit No. 4:05-cv-1112-CDP in U.S. District Court of Eastern Missouri on July 18, 2005. While still in that Court, SLU again discriminated against Dr. Kaminsky by not rehiring him for the 2005-2006 year based on discrimination against disability, religion and retaliation for filing an EEOC charge. The EEOC deemed this a "continuing action" in timely EEOC Charge No. 560-2006-00099 and issued a second "right to sue letter" on January 13, 2006. A First Amended Complaint to civil suit No. 4:05-cv-1112-CDP was filed on January 17, 2006 adding these new claims. Dr. Kaminsky filed a Writ of Mandamus and Judicial Complaint for allegations of prejudicial, non-neutral and biased opinions against him. The District Court Judge denied his motions for recusal and disqualification. The District Court then denied Dr. Kaminsky's motion for summary judgment, denied his demand for jury trial, granted SLU's motion for summary judgment and entered judgment in favor of SLU on all claims, stating that "there are no genuine issues of material fact" in an Order dated August 16, 2006.

Dr. Kaminsky filed a timely Notice of Appeal with the United States Court of Appeals for the Eighth Circuit on August 16, 2006. The Appellant Brief was filed on October 2, 2006, the Appellee Brief on November 1, 2006 and the Reply Brief on November 6, 2006. The Eighth Circuit entered a Pur Curiam Order, citing cases that support questioning whether Congress created a private right of action in IRS cases where they "find no reversible error of

fact of law" in this ADA and employment discrimination action with claims of malice, slander, defamation of character, hostile work environment, affirming the District Court's decision on June 26, 2007. A Petition for Rehearing was denied by the Eighth Circuit on July 3, 2007.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review should be granted because the District Court failed to construe plaintiff's *pro se* complaint and summary judgment liberally, denying summary judgment based alleging that a statement of uncontroverted facts was not filed in a timely manner and thus "procedurally flawed", citing their Local Rule 4.01(E) and that extensive documents submitted did not have accompanying affidavits, in opposition to Fed. R. Civ. P. 56(c)(e), as sole basis.

The District Court for Eastern Missouri denied Dr. Kaminsky's motion for summary judgment, in what it calls a "cursory review" because it claimed that Petitioner's statement of uncontroverted facts was filed "over a week past...the deadline for dispositive motions..." Dr. Kaminsky informed the District Court that his motion was sent in sufficient time, but returned in the U.S. Mail because it was a stamped large envelope over the "heightened security 12 ounce limit" and had to be handed to a postal employee. Therefore, it had to be remailed and then filed. The District Court then denied his motion to reconsider Dr. Kaminsky's motion for summary judgment. Dr. Kaminsky contends that the District Court erred in granting the Respondent's motion

for summary judgment. Respondent's Appellee Brief was deficient as it did not include a corporate disclosure statement as required by Fed. R. App. P. 28(b), failed to serve Petitioner contents for the joint appendix pursuant to Fed. R. App. P. 30(b) and Respondent failed to file a motion to proceed without a joint appendix pursuant to Fed. R. App. P. 30(f), without comment by the Eighth Circuit.

The District Court failed to construe plaintiff's pro se complaint liberally. The Eighth Circuit conflicts with the Second Circuit in *McPherson* when it reversed a District Court's dismissal of plaintiff's causes of action under ADA. Plaintiff's claims must be read so as to "raise the strongest arguments that they suggest." *McPherson v. Commbe*, 174 F.3d 276, 287 (2d. Cir. 1999). A pro se complaint should not be dismissed unless "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

One of the reasons given by the District Court in it's order denying Petitioner's motion for summary judgment was that it lacked affidavits to documents such as Petitioner's medical school and university diplomas, Petitioner's residency certificates, publications by Petitioner, medical awards granted, certificates of continuing medical education, State medical licenses and universal residency applications, showing that Dr. Kaminsky is a progressive and competent pathology resident who is current with qualifications far exceeding his peers at that time in the pathology residency at SLU. Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial.

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits."

The District and Eighth Circuit by granting Respondent's summary judgment, denied Petitioner's demand and right for a jury trial, against the Seventh Amendment of the United States Constitution and Fed. R. Civ. P. 38(b). This Court held that an action by an employee for a breach of a labor union's duty of fair representation entitled him to a jury trial under U.S. Const. Amend. VII: 29 U.S.C. § 185. *Chauffeurs, Teamsters, and Helpers Local No. 391 v. Terry*, 494 U.S. 558 (1990).

II.

Review should be granted because the District Court and Eighth Circuit erred in granting Respondent Saint Louis University School of Medicine summary judgment based on finding alleged reasons for not rehiring Petitioner Dr. Kaminsky are nondiscriminatory, not pretextual, that no causal link between discrimination and termination existed as the Eighth Circuit cited cases that support questioning whether Congress created a private right of action in IRS cases where they state that they "find no reversible error of fact of law" in an ADA and employment discrimination case.

Respondent relies on it's proffered reasons that they claim to be nondiscriminatory such as believing that Petitioner's medical license was suspended in the State of Missouri at the time of his application for rehire to their pathology residency program. It is undisputed that the State

of Missouri's website was not accurate at time Dr. Vogler, SLU's pathology residency program director checked the website, yet holds Petitioner responsible. The District Court found that it was not unreasonable for Dr. Vogler to rely on such inaccurate, outdated information in her decision to rehire Petitioner. Respondent also claims another reason for failing to rehire Petitioner was for misdemeanor criminal charges which did not occur in any employment setting, such as "harassment by telephone" Petitioner was charged with. The District Court denied Petitioners motion in limine to exclude such irrelevant, non-admissible information as evidence, pursuant to Fed. R. of Evid. §§ 403, 404. Petitioner did not have any criminal charges prior to his employment with Respondent and was 35 years of age at that time.

When the defendant meets its burden of showing a legitimate, nondiscriminatory reason for the employment action, the burden shifts back to the plaintiff to demonstrate that the defendant intentionally discriminated against him. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749 (1993). This can be accomplished by proving that the defendant's articulated reason for the adverse employment action is a mere pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825 (1973).

The Sixth Circuit concluded that "an employer's changing rationale for making an adverse employment decision can be evidence of pretext." *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 833 (6th Cir. 1996). Courts have generally reasoned that if an employer proffers a legitimate, non-discriminatory reason which the employee is unable to rebut (i.e., establish a question of fact as to pretext), that does

not automatically mean that the employer should prevail because, at best, it only establishes that the employer had one legitimate, non-discriminatory motivation. *Rachid v. Jack in the Box, Inc.*, 376 F. 3d 305, 310-313 (5th Cir. 2004). However, SLU has failed to even do this much. In fact, most of Respondent's reasons given for not rehiring Petitioner actually occurred while the Petitioner was employed with Respondent. Therefore, a reasonable person would conclude that they cannot rely on these proffered reasons as non-pretextual. They are not only discriminatory reasons but manufactured and Dr. Vogler moves from one reason to another just as shifty as the work environment was when Petitioner was employed with Respondent. Therefore, the District Court erred in denying that not only a factual dispute existed but that this is a prima facie case of discrimination.

In order to establish a prima facie case of discrimination, a plaintiff must demonstrate the existence of the following elements: (a) that he or she is a disabled person within the meaning of the ADA; (b) he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (c) he or she has suffered an otherwise adverse employment decision as a result of discrimination. *Shaner v. Synthes (USA)*, 204 F.3d 494, 500 (3d. Cir. 2000).

SLU offers proffered supposedly nondiscriminatory reasons for non-rehire of Dr. Kaminsky, but they do not have a uniform policy of non-rehire in their residency program employment policy.

Although some of Dr. Kaminsky's frustration to attempt to counter Respondent's hostile work environment was construed by Respondent to be threatening in nature and

offer this as one of their proffered reasons for failure to rehire, their malicious hostile work environment, all forms of their malicious discrimination they imposed upon Petitioner, and their continued denial of same, of course, has "generated a genuine issue of material fact that other 'motivation factor[s]' for the defendant's conduct w[ere] [his] protected characteristic[s]." *Dunbar v. Pepsi-Cola Bottlers of Iowa*, 285 F. Supp. 2d at 1197. (N.D. Iowa 2003)

In *Moysis*, the Eighth Circuit upheld the jury's verdict finding disability discrimination where the plaintiff was terminated from his position. The Eighth Circuit held that a jury could reasonably infer from the evidence of "suspicious timing" that the plaintiff was fired due to his disability. *Moysis v. DTG Datanet*, 278 F.3d 819 (8th Cir. 2002).

The District Court in this case, throughout the entire proceeding allowed this matter to continue without establishing that Petitioner met the requirements of the term "disability" under the ADA, despite Dr. Kaminsky's disclosure of over 300 pages of documented medical record that satisfies that he has a "record of" being misclassified as having a "mental condition" and for being involuntarily treated for same in an inpatient hospital for 90 days then outpatient for a period of two years involving a case of malpractice with misdiagnosis. The Fifth Circuit found that an executive who had blood cancer may have a record of a disability based on a 30 day hospital stay, limited vision, and isolation from others. *EEOC v. R.J. Gallagher*, 181 F.3d 645, 9 AD Cas. (BNA) 917 (5th Cir. 1999).

The ADA's definition provides: The term 'disability' means, with respect to an individual-- (A) a physical or mental impairment that substantially limits one or more of

the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § §12102(2) 12112(b). Petitioner maintains that he clearly meets the requirements as having "a record of such an impairment." Congress has ruled in EEOC Sec 902.1(b) that persons who may not have an impairment that substantially limits a major life activity but who have a history of, or have been misclassifies as having, such a substantially limiting impairment still meet the requirements of the term "disability" under 42 U.S.C. § 121112(b)(B).

Respondent also claims that Petitioner is somehow "scarred" of him for "aggressive behavior" that was the result of their progressive and continuing, intensely hostile work environment imposed on him. Then after meeting their expectations, the expectations changed and the fact that he met them was completely ignored resulting in termination, in attempts to further frustrate him.

Respondent also states they failed to rehire Petitioner because he made false statements on his universal application form in 2005 and 2006. Respondent incorrectly claim Petitioner listed his State of Missouri physician's license as "full" when it is full and not a residency training license and failed to list it as "suspended" when it was not and is not. The only entries the applicant can make on the universal application is that they either have a resident training license or full, permanent license as physician and surgeon which Petitioner was granted in 2000. They finally state that Petitioner "failed to meet the[se] ACGME [American Council of Graduate Medical Education] Institutional Standards" which they state are "preparedness, ability, aptitude, academic credentials, communication skills, and personal qualities such as motivation and integrity." These

are pretextual as Petitioner transferred as a third year pathology residency program with a full and permanent State of Missouri license as physician and surgeon from Wake Forest University Baptist Medical Center, a National Institutes of Health designated Comprehensive Cancer Center, one of only 43 in the country. Petitioner upon transfer to SLU already substantially exceeded the requirements of the American Board of Pathology for number of surgical specimens and autopsies performed. Additionally, he was a Medical Examiner for the North Carolina Bureau of Investigations. Plaintiff's superior qualifications, compared to the other employees can be evidence of pretext in a Title VII case. Regarding Respondent's proffered reason that they believed Respondent was engaged in drug use during his employment, Petitioner states that he was "erroneously regarded as engaging in such use, but is not engaging in such use" and therefore is not disqualified from seeking relief in ADA, 42 U. S. C. §12114(b)(3).

There may be cases in which the "multiple grounds offered by the employer for the adverse action of which the complainant complains are so intertwined, or the pretextual character of one of them so fishy and suspicious, that the complainant could prevail." *Russell v. Acme-Evans Co.*, 51 F.3d 64 (7th Cir. 1995). The Ninth Circuit held employer's unwritten policy not to rehire employees who left the company for violating personal conduct rules contravenes the ADA. Petitioner denies that he violated personal conduct rules while employed; however, Respondent states "past unprofessional conduct" in their proffered reasons.

The Eighth Circuit found a "temporal proximity" between the birth of a child with a disability of an employee (which was known to the employer), the enrollment of the

child in the healthcare plan, and the employer's decision to eliminate the employee's position was sufficient to create a genuine issue of fact regarding pretext and discrimination. *Strate v. Midwest Bankcentre, Inc.*, F.3d , 2005 WL 367240 (8th Cir. Feb. 17, 2005).

Petitioner had an unblemished employment history before employment with SLU. Petitioner claims that many of the adverse events that occurred while employed with Respondent clearly show a temporal proximity between SLU's hostile work environment and employment discrimination as cause of those events that Respondent is now offering as proffered reasons for not rehiring Petitioner.

III.

Review should be granted because both the district court and Eighth Circuit decisions conflict with this Court's opinion as in *Kolstad v. American Dental Ass'n* that to recover punitive damages under Title VII and ADA that a plaintiff does not have to show "egregious" discrimination but just that the employer possessed "a positive element of wrongdoing."

Petitioner clearly claims egregious discrimination by SLU and feels the record established through disclosure and pleadings in both the District Court and Eighth Circuit reflects this. This Court held that to obtain punitive damages a plaintiff need not prove that the discriminatory conduct was "egregious", but merely show that the wrongdoer possessed "a positive element of conscious wrongdoing." *Kolstad v. American Dental Ass'n, No.* 98-208, 1999 WL 407481 (US June 22, 1999). *Kolstad* held that "egregious" misconduct was probative but not necessary for an award of punitive

damages. 527 U.S. at 538. Respondent's failure to rehire Dr. Kaminsky based on retaliation for filing an EEOC charge, religious and disability employment discrimination for the 2006 year, while this case was being heard in District Court clearly shows malice by the Respondent. Instead, it interprets the employer's "malice" or "reckless indifference" to refer to the employer's knowledge that it may be violating federal laws and protected rights. *Id.* at 526-36. *Kolstad* defense requires that the employer has adopted a discrimination policy and made good-faith efforts to educate its employees about the policy and Title VII's requirement, and further requires employer to properly enforce its discrimination policy. *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 89 FEP 1164 (10th Cir. 2002). SLU lacks a written uniform no-rehire employment policy but seems to be claiming adherence to such unwritten policy. The Ninth Circuit found that a petitioner's application of a neutral no-rehire policy was not a legitimate, nondiscriminatory reason for rejecting respondent's application or to defeat a prima facie case of employment discrimination. *Raytheon Co. v. Hernandez*, 298 F.3d 1030. Respondent also has written several poor, untrue, defaming letters of recommendation for Petitioner in the past which led to Petitioner not being able to obtain completion of his pathology residency at other institutions that also constitute employment related claims. *Bals v. Verduzco*, 600 N.E. 2d 1353 (Ind. 1992).

The same Eighth Circuit ruled that "at the outset, we note that, in the context of the *McDonnell Douglas* analytical framework, a court's use of the words "pretext," "pretextual" or similar terminology, often must be read as shorthand for indicating that a defendant's proffered discriminatory explanation for adverse employment action is a pretext *for unlawful discrimination*, not that it is merely false in some

way. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502. 516 (1993) ("in our view 'pretext' means 'pretext for discrimination'"). *Strate v. Midwest Bankcentre, Inc.*, 398 F.3d 1011, (8th Circuit 2005). In *Burdine* the plaintiff may succeed in meeting the ultimate burden of persuasion "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 256 (1981).

Under the *McDonnell Douglas* framework, a plaintiff must establish a prima facie case of intentional discrimination by showing that (i) he belongs to a protected class; (ii) he was qualified for the position; (iii) he suffered an adverse employment action; and (iv) the adverse action occurred under suspicious circumstances giving rise to an inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Desert Palace modified the law of reasoning with summary judgment. *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003) 299 F.3d 838. Under *Desert Palace*, "plaintiff only needs to offer evidence that discrimination was 'a' motivating factor." The Eighth Circuit in *Strate* found the Petitioner does not need to prove that the Respondent's proffered reason was entirely untrue, merely that it was not the sole motivating factor in her discharge." As in *Desert Palace*, this Court found that "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." Petitioner maintains that the District Court erred in solely using the *McDonnell Douglas*

framework to base it's opinion on denying a prima facie case of discrimination and did not consider the authority of *Kolstad*, *Strate*, *Desert Palace*, or *Dunbar* in it's decision.

IV.

Review should be granted because both the District Court's and Eighth Circuit's finding that the religious discrimination, hostile work environment, failure to promote and wrongful termination claims are "time barred" conflict with the Ninth Circuit's finding that that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act *must* also be considered for the purposes of liability.

Dr. Kaminsky's legal separation and divorce occurred without permission from the "Church." This seemed to upset Dr. Vogler who insisted on asking about Dr. Kaminsky's family matters, despite communicating to Dr. Vogler that this was unwanted and an interference with Dr. Kaminsky's daily job performance. Conduct of someone in a particular position of authority who engages in "oppressive conduct and abuse of position" may yield liability. *Fowler S. Harper et al., The Law of Torts* § 9.1, at 609 n. 23 (2d ed. 1986 & Supp. 2004). After Dr. Vogler was informed that Dr. Kaminsky was getting a legal separation he was then forced against his will to attend daily meetings with her to discuss his family matters, sometimes interrupting his work at critical times. His performance evaluations began being slowed in being returned, some never returned, many illegible, some not signed, others not evaluated, and some with contradictory evaluations even on the same evaluation. These became so poor that the evaluators began to also document with typed

pages instead of using the universal evaluation form, such as the surgical pathology and hematopathology evaluation form. This lead to further difficulties and hostility imposed on Dr. Kaminsky, including an unprecedented "ad hoc" Committee consisting of SLU professors he had not even met before, who decided his fate in less than a half-hour. Hostility became more intensified and followed Dr. Kaminsky around the 350 bed hospital. Strictly, according to the Second Vatican Council, the Roman Catholic Church, of which Saint Louis University has affiliation, views civil divorce as not being valid in the site of God or his Church and is not acceptable as granting permission to date or practice adultery by entering another marriage, unless annulment is granted, which are viewed as difficult to obtain and only pre existing conditions are considered. Dr. Vogler and other supervising members of the pathology residency program upheld these religious principles without regard to violations of federal laws.

Petitioner contacted Mr. Robert Bondurant, RN, LCSW program coordinator of the Missouri Physician Health Program in St. Louis, Missouri concerning not being matched by the Respondent's pathology residency program for the 2005 year, beginning July 1, 2005. Mr. Bondurant agreed to call the Respondent due to the fact that Dr. Robert Heaney, Associate Dean Saint Louis University School of Medicine firmly stated that Petitioner should never contact or be present on the grounds of Saint Louis University Hospital, owned now by Tenet Healthcare Corporation, a corporation heavily fined by the Office of Inspector General for it's fraudulent billing practices and healthcare fraud. He stated, "in fact, he would be negligent should he not contact Ms. Terri McCarthy", Respondent's employee assistance program ombudsman. Mr. Bondurant then asked Petitioner

"if they do not agree to take you back, then what are you going to do?" Petitioner replied to Mr. Bondurant that he had a scheduled interview in a different residency program at St. Elizabeth's Hospital in Belleville, Illinois, managed by the Respondent. Petitioner also stated that he was intending to file an Equal Opportunity Employment Commission complaint against the Respondent, should they chose not to rehire Petitioner for discriminatory reasons, being fully aware of the situation. Mr. Bondurant advised Petitioner not to do so. Mr. Bondurant called Petitioner back sometime later on March 15, 2006, cursing Petitioner out, stating that the Ms. Terri McCarthy, became irate and emotional, stating that the Petitioner "would never be taken back and in fact there was talk about banning Dr. Kaminsky university system wide from ever taking any courses in any other department or school within the university." Mr. Bondurant also stated that the Respondent stated that they doubted that Petitioner would file a complaint, that Petitioner probably did not know how to do such thing and it will never go anywhere anyway. The interview with a different residency department at SLU was scheduled for noon on March 16, 2005. At 8:00 A.M. on March 16, 2005, Petitioner received a call abruptly canceling his interview for employment with Respondent due to retaliation against filing an EEOC charge. Respondent failed to give reason for the abrupt interview cancellation and refused returning Petitioner's telephone calls to inquire, but the temporal proximity between the scheduling and cancellation of the interview can not be argued to be anything but retaliation for stating that Petitioner was going to file an EEOC charge, for not being rehired in the pathology department, as the interview was refused rescheduling and telephone calls with voicemails were not returned to Petitioner.

Elements of retaliation under ADA and Title VII of the Civil Rights Act of 1964 are "(i) a plaintiff was engaged in protected activity; (ii) the alleged retaliator knew that plaintiff was involved in protected activity; (iii) an adverse decision or course of action was taken against plaintiff; and (iv) a causal connection exists between the protected activity and the adverse action." *Weissman v. Dawn-Joy Fashions, Inc.*, 214 F.3d 224, 234 (2d. Cir. 2000); *Sands v. Runyon*, 28 F.3d 1323, 1331 (2d. Cir. 1994).

To establish a case of unlawful retaliation, a plaintiff must show that 1) he engaged in protected activity; 2) he suffered an adverse employment action either after or on temporaneous with his protected activity; and 3) a causal connection exists between his protected activity and the employer's adverse action. *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3d. Cir. 1997). Both the Third and Seventh Circuits hold that illegal retaliatory acts are actionable if sufficient to "deter a person of ordinary firmness." *Suppan v. Dadonna*, 203 F.3d at 235; *Bart v. Telford*, 677 F.2d at 625.

The District Court erred in deciding that Petitioner's claims of hostile work environment, religious discrimination, failure to promote and wrongful termination were time barred in it's early order dated September 26, 2005. The Ninth Circuit also ruled that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act *must* also be considered for the purposes of liability. *National Railroad Passenger Corporation v. Morgan* 536 U.S. 101 (2002) 232 F.3d, at 1015. This Court in *National Railroad*, affirmed the decision of the Ninth Circuit that although many of the acts upon which his claim depends occurred outside the 300 day filing period, we cannot say that they are not part of the same

actionable hostile environment claim as long as the discriminatory acts prior to the limitations period are sufficiently related to those within.

Hostile work environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. *Lindemann & Grossman, Employment Discrimination Law* 348-349 (3d ed. 1996). The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence. *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 21 (1993). To prove a prima facie case of hostile work environment, one must show 1) there was unwelcome harassment; 2) the harassment was based on sex, race, color, national origin, religion, age or disability; 3) the harassment was so severe or so pervasive that it altered the conditions of employment and created an abusive atmosphere; and 4) there is some basis for imposing liability on the employer. *Causey v. Balog*, 162 F. 3d 795, 801 (4th Cir. 1998). In determining if the third element of the prima facie case is met, the Court must consider the frequency and severity of the harassment, whether it was physically threatening or humiliating, whether it reasonably interfered with work performance, and whether it resulted in physical harm. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). Dr. Vogler either paged Petitioner daily herself or had her secretary do so. These pages seemed to be occur at critical times in the Petitioner's daily schedule, when work volume was the highest or something needed to be addressed at once. Although the pages were to schedule the meeting the next day, they took time and that scheduling could have been done in the daily meeting. Both the pages and meetings were unwanted and Dr. Vogler was informed of this each time. Then Petitioner's peers, female residents in the pathology

department, began asking if Petitioner somehow "liked" Dr. Vogler. Petitioner flatly denied this. After sometime, Dr. Vogler began a yearly meeting with the other residents in the pathology department. Dr. Kaminsky was humiliated by the frequency and timing of the meetings. Even such actions that a reasonable person would deem positive such as attending a national pathology conference in Philadelphia by Petitioner elicited a meeting with Dr. Vogler and Petitioner to question this. Although this discriminatory environment was not physical in nature, it was humiliating, threatening, abusive and hostile. Later in Petitioner's pathology residency at SLU a female pathology resident was promoted to chief pathology resident by Dr. Carole Vogler in a meeting with all residents including Petitioner. The fact that this resident was female was made a positive point by Dr. Vogler. Dr. Vogler seemed to take "great pleasure" in promoting a female pathology resident announcing this in a group meeting with all the other pathology residents. Although there were other male pathology residents Dr. Vogler had an issue with Dr. Kaminsky's religious thought of his right to become legally separated and divorced from his ex-wife. In that meeting Dr. Vogler after promoting the female pathology resident, began asking the male pathology residents, including Dr. Kaminsky about taking Part III of the national boards. Many of the other pathology residents had not done so at that time. Dr. Kamisky informed the attendees of that meeting, including Dr. Vogler that he had already passed that licensing examination. Dr. Vogler replied, "When are you going to take it?" after she clearly heard his response that he had already passed stated exam. Dr. Kaminsky stated to Respondent that they were violating the Civil Rights Act of 1964, as amended in 1981 and the Civil Rights Act of 1991. Respondent's response was "well then maybe you should begin researching those laws." As stated, Petitioner had

already exceeded the surgical pathology requirement of 2,500 surgical specimens by the American Board of Pathology while at Wake Forest University Baptist Medical Center with 2, 763 in his first two years of the pathology residency. The first rotations at SLU were nothing other than surgical pathology and the surgical pathology rotations became the issue to which the Respondent's pathology supervisors made problematic and at issue. Then when the hostile work environment was in effect, everything the Petitioner did became an issue. Dr. Kaminsky already mastered the art of cutting an intraoperative frozen section, but was instructed each time like a child how to perform this with members of the surgical departments of SLU present. This was again very humiliating. The presence of race-based physical threats undeniably strengthens a hostile work environment claim. The absence of such, however, is in no way dispositive, when there is sufficient evidence from which a reasonable jury could conclude that allegedly harassing conduct was otherwise "humiliating." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993). After all the damage was done in the alleged hostile work environment by Respondent, he was terminated on October 31, 2001. Respondent after several months then issued Dr. Kaminsky a residency certificate for all months completed, July 2000 to October 2001. After Dr. Kaminsky received this certificate from Respondent, he called and asked to be rehired in 2002, Respondent refused stating "you will have to complete your residency somewhere else." A requirement for other pathology programs were three to four letters of recommendation. Dr. Kaminsky contacted SLU several times for letters of recommendation. They did send some to other pathology programs, but instead of being positive, the letters were poor and slanderous. The other pathology programs informed Dr. Kaminsky that he was not being hired

due to the opinions in SLU's letters of recommendation not because of his abilities, qualifications or training.

Based on the serial violations, past hostile work environment, discrimination and retaliation for filing an EEOC charge, even occurring while this action was being heard in District Court, it is very unlikely that Respondent would change it's outlook on Respondent as his divorce remains in effect. Therefore, rehire is likely not an option in a reasonable thinking person's eyes. However, the issue is concerning the damages that the Petitioner has suffered, not only to his career but when he transferred to SLU, he did so with intent of completion of his pathology residency in three to four years. Petitioner has a thirteen year old daughter now. Petitioner's daughter was six years old at the time of his transfer. The transfer from North Carolina to St. Louis, Missouri with intent to complete residency in three to four years, while living with his daughter during the Summers and holidays was reasonable. However, as a result of SLU's discrimination that lead to termination, it has been seven years since he has lived full time with his daughter, and still his pathology residency is not completed, with 20 months remaining. Although he has lived with his daughter during the Summers and seen her on holidays since 2000, it is not what was intended and certainly, a reasonable person would not view this as a perfect current situation and certainly not what was intended by Petitioner. Respondent is clearly aware of this yet maintains a firm disposition of interference carried out through discrimination in a continuing violations manner. This seems to be a way to show Petitioner that they somehow are superior to him and his family and/or vindictive in nature for the poor matters that occurred in their lives. It is undisputed that Dr. Vogler does not have children herself and placed Dr. Kaminsky on call during Christmas holidays while

he was employed at SLU as a third year upper level resident. Dr. Vogler knew well that Dr. Kaminsky had plans to visit his daughter for vacation during that time in North Carolina. Two first year residents, both females were scheduled for vacation during those Christmas breaks. This was an issue taken as Dr. Kaminsky somehow did not wish to work and created problems with those first year residents. As a result of Respondent's unwillingness to rehire Petitioner, the issue of compensation for damages incurred becomes an issue. Dr. Kaminsky alleges that if Respondent would not have tortuously interfered with his contract, thereby failing to promote him from 3rd year pathology resident to 4th year pathology resident in 2001, created a hostile work environment and discriminated against him, fueling wrongful termination, he would have been a board-certified or at least board-eligible anatomic and clinical pathologist on June 30, 2003.

The difference between residency pay and benefits and attending pathologist pay and benefits is astronomically different. As a result of many failure to rehire, Petitioner claims Respondent is responsible for compensation for such federal violations such as front pay and all other relief deemed just. This Court found that front pay is not an element of compensatory damages within the meaning of section 706(g) of the Civil Rights Act of 1964 under § 1981a, and, therefore, held that the statutory cap of § 1981a(b)(3) is inapplicable to front pay. Congress in § 1981a, sought to expand the available remedies by permitting the recovery of compensatory and punitive damages in addition to previously available remedies, such as front pay. *Pollard v. E.I. Dupont De Nemours & Co.*, 532 U.S. 843 (2001).

The Eighth Circuit also erred in allowing

Respondent's statements in Appellee Brief, pp. 51-52, stating that "Dr. Kaminsky is using his Brief as the vehicle to make accusations of "defamation of character, tortuous [sic] interference with contract, slander, [and] malice" against SLU." Respondent claims that "...these claims were never raised at the District Court and such claims cannot be considered by this Court on appeal." citing *Int'l Bhd. Of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1096 (8th Cir. 2004). This clearly is an inaccurate statement, those allegations appear in the District Court pleadings and can be found in the Petitioner's memorandum in support of motion for summary judgment filed with the District Court on May 12, 2006.

Damages to Dr. Kaminsky incurred from this prima facie case of employment discrimination as stated in this case are substantial, of malicious nature and of public importance as the federal violations remain without justice served. They include but are not limited to: damages to relationship of Dr. Kaminsky and Dr. Kaminsky's now thirteen-year-old daughter, loss of enjoyment of life, inconvenience, mental anguish, future pecuniary losses, compensatory damages, punitive damages, emotional pain and suffering, front pay, back pay, loss of benefits provided by SLU including health care expenses and 403b contributions by SLU, loss of medical malpractice insurance provided by SLU, loss of travel expenses to meetings and for continuing medical education including board preparation course expenses, reimbursed continuing medical education paid for by SLU for all other pathology residents, yearly medical license fees for Dr. Kaminsky's medical license, other stipends granted to SLU's pathology residents, including but not limited to book allowances and society fees, damages incurred from loss of dignity and respect from work associates, friends, family,

relatives. Consequences of expiration of "hardship" deferments of Dr. Kaminsky's osteopathic medical school loans which amount to well over $250,000, the damage to credit due to "short sale" of Dr. Kaminsky's home due to threat of foreclosure and loss of income, the imposition of a renewable 10-year board certificate issued by the American Board of Pathology which changed from issuance of an unlimited, non-time dated certificate if the pathologist was certified prior to 2006, which if not for the SLU's discrimination, Dr. Kaminsky would have been board-eligible/certified and finally the loss of two rare, trained American Kennel Club (AKC) registered Doberman Pincher dogs and interest on all of above damages.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, filed on June 26, 2007, is reported at Kaminsky v. St. Louis Univ. Sch. of Med., 2007 U.S. App. LEXIS 15334 and a reformatted copy appears below in Appendix A.

The opinion of the United States District Court of Eastern Missouri, filed on August 16, 2007, is reported at Kaminsky v. St. Louis Univ. Sch. of Med., 2007 U.S. Dist. LEXIS 57418 (E.D. Mo., Aug. 16, 2006) and a reformatted copy appears below in Appendix B.

JURISDICTION

The date the United States Court of Appeals for the Eighth Circuit made it's decision on this case was June 26, 2007.

The order of the United States Court of Appeals for the Eighth Circuit denying a petition for rehearing was filed on July 3, 2007, is unpublished, and a reformatted copy appears below in Appendix C.

The jurisdiction of this Court to review the Judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONCLUSION

The petition for a Writ of Certiorari should be granted. This Court may wish to reversal of the United States Court of Appeals for the Eighth Circuit's affirmation of the

United States District Court of Eastern Missouri's decision.

Respectfully submitted,

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(618) 233-2987
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No. 07-

DR. RICHARD ANTHONY KAMINSKY, D.O.,
Petitioner,
v.

SAINT LOUIS UNIVERSITY SCHOOL OF MEDICINE,
Respondent.

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,895 words, excluding the parts of the documents that are excluded by Supreme Court Rule 33.1(d).

I declare under perjury that the foregoing is true and correct.

Executed on September 18th, 2007.

R. A. Kaminsky, D.O.

Dr. Richard A. Kaminsky, D.O.

Patricia A Rende

Certified Public Notary

September 18, 2007

"OFFICIAL SEAL"
PATRICIA A RENDE
NOTARY PUBLIC, STATE OF ILLINOIS
COMMISSION EXPIRES MARCH 09, 2011

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No: 06-3139

Richard Anthony Kaminsky
also known as Richard
Anthony Kaminsky, D.O.,
also known as Dr. Richard
Anthony Kaminsky,

Appellant,

v.

Saint Louis University School of
Medicine,

Appellee.

Appeal from the United States
District Court for the
Eastern District of Missouri.

Submitted: May 14, 2007
Filed: June 26, 2007

Before MURPHY, HANSEN, and COLLOTON, Circuit Judges.

PER CURIAM.

Dr. Richard Kaminsky appeals the district court's[1] adverse grant of summary judgment in his Americans with

Disabilities Act, 42 U.S.C. § 12112(a), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17, suit against Saint Louis University School of Medicine (SLU). Upon careful de novo review, see Ferguson v. United States, 484 F.3d 1068, 1072 (8th Cir. 2007), we find no reversible error of fact or law. Even if Dr. Kaminsky had been able to establish a prima facie case of discrimination, SLU proffered sufficient nondiscriminatory reasons for its actions that Dr. Kaminsky failed to rebut as pretextual. See Freeman v. Fahey, 374 F.3d 663, 666 (8th Cir. 2004). Accordingly, we affirm based upon the district court's well-reasoned and through order. See 8th Cir. R. 47B.

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[1]The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RICHARD ANTHONY KAMINSKY,	)	
Plaintiff,	)	
vs.	)	Case No. 4:05CV1112CDP
SAINT LOUIS UNIVERSITY SCHOOL OF MEDICINE,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff Dr. Richard Anthony Kaminsky alleges that he was not hired into Saint Louis University School of Medicine's (SLU) pathology residency training program for the years 2005-2006 and 2006-2007 because of his disability and his religion. Dr. Kaminsky also claims that SLU retaliated against him for his stated intent to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) by influencing St. Elizabeth's Hospital in Belleville, Illinois to not hire him. Dr. Kaminsky seeks relief under the Americans with Disability Act (ADA), 42 U.S.C. § 12112(a), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

SLU claims that it failed to hire Dr. Kaminsky for numerous reasons, including his medical license suspensions in Missouri and Illinois, criminal conduct.

failure to provide a complete residency application, and past unprofessional conduct. Further, SLU contends that it had no knowledge of Dr. Kaminsky's intent to file a charge of discrimination and thus could not have retaliated against him.

SLU has moved for summary judgment on each of Dr. Kaminsky's claims. Even if I assume that Dr. Kaminsky could establish a prima facie case of religious and disability discrimination, he has failed to present any evidence that would suggest that SLU's proffered reasons for its failure to hire him are pretextual or otherwise unworthy of credence. Further, Dr. Kaminsky's retaliation claim fails because there is no evidence that the SLU decision-makers were aware of his intent to file a charge of discrimination. Because there are no genuine issues of material fact and the undisputed evidence shows no impermissible motive, I will grant SLU's motion for summary judgment.

Background

Dr. Kaminsky received his doctorate of osteopathic medicine in 1998 from the University of Missouri at Kansas City. He then completed two years of a pathology residency training program at Wake Forest University in North Carolina. In July, 2000, Dr. Kaminsky transferred to the pathology residency training program at SLU. According to Dr. Kaminsky, his transfer to SLU was motivated by marital problems he was having with his then-wife in North Carolina. He testified that he

had previously met Dr. Vogler, the director of SLU's pathology program, and called her to see if he could transfer to SLU. He told her the reason he wanted to move was because he wanted to separate from his wife. Dr. Vogler was among those at SLU who agreed to hire him in 2000.

Shortly after his arrival at SLU, Dr. Kaminsky's instructors began indication their concern that he did not possess the requisite skills and aptitude necessary to succeed in the program. They reported problems both of competence and of attitude. Dr. Kaminsky alleges that he began experiencing psychiatric symptoms of aggression while at SLU due to his marital problems, the separation from his young daughter, and the harsh environment at SLU. He alleges that his supervisors and others harassed him because SLU, as an organization associated with the Catholic Church, did not approve of his divorce. It is undisputed that Dr. Vogler, who was then Dr. Kaminsky's supervisor, met with him on multiple occasions to discuss his work performance. Dr. Kaminsky characterizes these conversations as "near daily unwanted meetings" in which Dr. Vogler would pry into his personal problems. Dr. Vogler admits that she discussed Dr. Kaminsky's impending divorce with him on multiple occasions, but only because his marital problems were affecting his work performance, not because she believed Dr. Kaminsky, as a Catholic, was wrong to seek a divorce.

Dr. Vogler referred Dr. Kaminsky to Teri McCarthy, the director of SLU's Employee Assistance Program (EAP). SLU's EAP is designed to help post-graduate trainees with personal and work-related issues as well as provide short-term counseling on a confidential basis. Dr. Kaminsky met with Ms. McCarthy several times regarding his poor work reviews. His work reviews did not improve, and as a result, SLU placed Dr. Kaminsky on probationary status on February 16, 2001. In July, 2001, SLU chose not to elevate Dr. Kaminsky to fourth-year resident status, but instead offered him a four-month contract extension at the third-year resident pay grade. This contract was not renewed, and Dr. Kaminsky's training at SLU officially ended on or around October 31, 2001.

During Dr. Kaminsky's residency at SLU and thereafter, Dr. Vogler and Dr. Robert Heaney, SLU's Associate Dean of Graduate Medical Education, observed what they perceived as unprofessional conduct on the part of Dr. Kaminsky. Among other things, Dr. Kaminsky made obscene phone calls and sent intimidating letters sent to Drs. Vogler and Heaney and their staffs. Dr. Kaminsky does not deny this conduct. He admits that he may have done things that were perceived as "scary," "hostile," and "aggressive" by SLU's employees, but contends that his conduct was caused by the oppressive and abusive environment that SLU had created for him.

In January, 2002, the Missouri Department of Health and Senior Services' Bureau of Narcotics and Dangerous Drugs (BNDD) received a complaint which alleged that Dr. Kaminsky self-prescribed a controlled substance, Phentermine, under the alias Richard Johnson on two separate occasions in September and October, 2001. Dr. Kaminsky did not dispute these allegations, and as a result, the BNDD issued him a Letter of Censure on January 30, 2002. Although the wrongful conduct occurred while Dr. Kaminsky was employed at SLU, it did not come to light until after he left. He was ultimately charged in St. Louis County with two counts of fraudulently obtaining or attempting to obtain a controlled substance, a class D felony. He pled guilty to reduced misdemeanor charges in 2004, although SLU did not learn of the Missouri criminal charges until discovery in this case. SLU has presented uncontested evidence that it would have considered the underlying conduct to be grounds for discharge, had it known that he had written fraudulent prescriptions while employed by SLU.

Beginning on June 24, 2002, Dr. Kaminsky participated in a Transitional Internship Program at Forest Park Hospital in St. Louis. Dr. Kaminsky's supervisor in the program was Dr. Robert Hill. On October 24, 2002, Dr. Hill was informed by the BNDD that Dr. Kaminsky's federal and state controlled substance registrations had been revoked due to the drug charges pending against him. Dr. Kaminsky was

dismissed from Forest Park's program on November 1, 2002. The dismissal was based in part on the registrations revocations and Dr. Kaminsky's failure to cooperate with the hospital's investigation of the matter, as well as on other instances of unprofessional conduct observed by staff there.

In December, 2002, Dr. Kaminsky was charged with six counts of criminal conduct, including harassment by telephone, violation of an order of protection, and obstructing a peace officer in St. Clair County, Illinois. These charges arose out of his harassment and threatening a former girlfriend, violating an order of protection she had against him, and then threatening a witness. The trial judge found Dr. Kaminsky unfit to stand trial and admitted him to a state mental hospital in Alton, Illinois. Dr. Kaminsky was treated for hypothyriodism and psychosis in Alton until his release on June 10, 2003. That same month, Dr. Kaminsky pled guilty to the six misdemeanor charges pending in St. Clair County and was sentenced to two years probation.

On March 21, 2003, Dr. Kaminsky's license to practice medicine in Illinois was suspended due to his failure to submit to a mental or physical examination. On September 8, 2003, his license to practice in Missouri was suspended for

three years or until the Missouri State Board of Registration for the Healing Arts[1] deemed him fit to return to practice. The Missouri license suspension arose from a Joint Stipulation of Facts entered into between the Board and Dr. Kaminsky which established cause to discipline Dr. Kaminsky based upon his guilty pleas to the St. Clair County charges.

After his Missouri medical license was suspended, Dr. Kaminsky sought the assistance of the Missouri Physicians Health Program (MPHP), a program designed to assist physicians with medical license problems. Robert Bondurant, the Program Coordinator of MPHP, assisted Dr. Kaminsky in his efforts to have his Missouri license reinstated. On October 15, 2004, the Board reinstated Dr. Kaminsky's medical license on a probationary status for the purpose of completing a residency training program. Due to a clerical error, however, Dr. Kaminsky's probationary reinstatement in October, 2004, was not available to the public via the Missouri State Board of Professional Registration's website until at least October, 2005.

Once Dr. Kaminsky's Missouri license had been reinstated, Mr. Bondurant contacted area medical schools on Dr. Kaminsky's behalf to determine what his prospects were for completing his residency. In this effort, Mr. Bondurant

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[1]The Missouri State Board of Registration for the Healing Arts is the state's licensing and regulatory authority for physicians and surgeons.

contacted Ms. McCarthy at SLU in the fall of 2004. Ms. McCarthy informed Mr. Bondurant that, in her opinion, Dr. Kaminsky would not be welcome back at SLU due to his past unprofessional behavior.

Dr. Kaminsky nevertheless submitted an application for SLU's 2005-2006 pathology residency training program in December, 2004. In his application he did not reveal that he had an Illinois license that was suspended, and he falsely stated this his Missouri license had been suspended because of a medical illness, instead of revealing that the suspension was a result of the Illinois criminal charges. He also did not list his experience at Forest Park Hospital or indicate that he had been discharged from that program. The form asked if he had any felony convictions, and he answered "No," which was a truthful response. The form did not ask about misdemeanor convictions or other charges.

Dr. Vogler chose not to interview or rank Dr. Kaminsky for a position in its pathology residency program in 2005-2006.[2] According to Dr. Vogler, she determined that Dr. Kaminsky was not eligible for SLU's program for a variety of reasons, including his past unprofessional conduct at SLU and his medical license

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[2]SLU participates in the National Resident Matching Program, which allows students and program directors to rank their preferred programs and students, respectively. Students register for the match program between August and December, and candidate interviews take place in January. From mid-January through February, candidates and programs submit their preferences. In the third week of March, the results of the match are announced.

suspensions. On March 15, 2005, Dr. Kaminsky learned that he did not match with SLU. That same day, he contacted Dr. Charles Robacker, director of the family medicine residency program at St. Elizabeth's Hospital in Belleville, Illinois, and scheduled an interview for the next day. St. Elizabeth's family medicine program is institutionally-sponsored by SLU, and is an integral part of SLU's Graduate Medical Education Program.

Dr. Kaminsky also contacted Mr. Bondurant of the Missouri Physicians Health Program that day, and informed him that he intended to file a charge of discrimination against SLU based on his failure to match into SLU's program. Mr. Bondurant became very upset, and advised Dr. Kaminsky not to file the charge. Dr. Kaminsky alleges that Mr. Bondurant then called Ms. McCarthy at SLU and informed her of Dr. Kaminsky's intent to file a charge of discrimination. Mr. Bondurant and Ms. McCarthy both deny that such a conversation took place, and Dr. Kaminsky has not presented any evidence to contradict their testimony. On March 16, Dr. Kaminsky was informed by Dr. Robacker's staff that his interview at St. Elizabeth's had been cancelled and would not be rescheduled. Dr. Kaminsky claims that he asked Dr. Robacker's assistant whether the decision was based on input from SLU, and she replied, "you can be certain that it was."

Dr. Kaminsky filed a charge of discrimination with the EEOC and the

Missouri Commission on Human Rights on April 25, 2005, and received a right to sue letter on June 15, 2005. On July 18, 2005, he filed this suit. In addition to the claims of religious and disability discrimination and retaliation addressed in this motion, his complaint also stated claims for hostile work environment and wrongful termination arising out of his 2000-2001 tenure at SLU. I dismissed those claims as time barred in my September 29, 2005 Order. Dr. Kaminsky has repeatedly asked me to reconsider that ruling, arguing that the harassment by SLU while he was employed there, the 2001 termination, and the recent refusals to rehire him are part of a "continuing violation." He also contends that his criminal conduct cannot be considered by the court (and could not be considered by SLU), because that conduct was caused by SLU's on-the-job harassment of him.

On January 19, 2006, Dr. Kaminsky filed a supplemental complaint which added claims of disability and religious discrimination as well as retaliation regarding SLU's failure to hire him for the 2006-2007 pathology residency training program. According to the complaint, Dr. Kaminsky submitted an application for this program in May, 2005, but was not hired.

Discussion

The standards for summary judgment are well settled. In determining whether judgment should issue, the Court views the facts and inferences

from the facts in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving party has the burden to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1896); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in its pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323.

1. Disability and Religious Discrimination

Dr. Kaminsky claims that SLU's decision not to hire him into its pathology residency training program for the years 2005-2006 and 2006-2007 was based on his alleged disability and his past divorce. His claims are not founded on any direct evidence of discrimination, but instead rest on his perceptions of bias on the part of Dr. Vogler. Under these circumstances, Dr. Kaminsky's failure to hire claims must be analyzed under the burden-shifting framework outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). Simpson v. Des Moines Water

Works, 425 F.3d 538, 542 (8th Cir. 2005) (ADA claim); Seaworth v. Pearson, 203 F.3d 1056, 1057 (8th Cir. 2000) (religious discrimination claim).

Under this framework, Dr. Kaminsky bears the initial burden to establish a prima facie case of either disability or religious discrimination discrimination. To establish a prima facie of disability discrimination, Dr. Kaminsky, must show that (1) he is disabled within the meaning of the ADA; (2) he is qualified, with or without reasonable accommodation, to perform the essential functions of his job; and (3) he suffered an adverse employment action on account of his disability. Simpson, 425 F.3d at 542 (citing Henderson v. Ford Motor Co., 403 F.3d 1026, 1034 (8th Cir. 2005)). To state a prima facie case of religious discrimination under these circumstances, Dr. Kaminsky must demonstrate that (1) he was subjected to an adverse employment action; (2) at the time of employment action was taken, his job performance was satisfactory; and (3) that some evidence exists to support the inference that them employment action was taken in response to the employee's failure to live up to the employer's religious expectations. Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1037-38 (10th Cir. 1993); Venters v. City of Delphi, 123 F.3d 956, 972 (7th Cir. 1997).

Once a plaintiff makes a prima facie case of either disability or religious discrimination, the burden then shifts to the employer to articulate a legitimate, non-

discriminatory reason for its failure to hire the plaintiff. Simpson, 524 F.3d at 542; Seaworth, 203 F.3d at 1057. The defendant's burden is one of production, not proof. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 245-55 (1981); Krenik v. County of Le Sueur, 47 F.3d 953, 958 (8th Cir. 1995). The defendant need not persuade the Court, rather, it must simply provide some evidence of a non-discriminatory reason for its action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993).

Once the employer meets its burden of showing a legitimate non-discriminatory reason for its actions, the plaintiff must come forward with some evidence to show that the proffered reasons are a pretext for discrimination. Simpson, 524 F.3d at 542; Seaworth, 203 F.3d at 1057. The employee may prove pretext directly, by showing that employer was more likely motivated by a discriminatory reason, or indirectly, by showing that its explanation is unworthy of credence. Rose-Maston v. NME Hospitals, Inc., 133 F.3d 1104, 1108 (8th Cir. 1998).

The factual record in this case is voluminous. SLU has produced documents, depositions and affidavits. While Dr. Kaminsky has produced some exhibits, he relies mainly on his own unsworn allegations to oppose summary judgment. I will overlook his procedural shortcomings, however, and will consider his allegations as

if they were his own sworn testimony, and I will consider the evidence he submitted in support of his own motion for summary judgment as well as that he submitted in response to the defendant's motion. Even so, of course, to the extent his allegations are hearsay or otherwise concern things of which he has no direct knowledge, they are not admissible and cannot be relied upon. I am deciding this case on the merits, and not on any issues related to Dr. Kaminsky's failure to follow court rules.

I will analyze the discrimination claims at the last stages - that is, I will consider whether the undisputed facts show that SLU had non-pretextual, legitimate, non-discriminatory reasons for its actions. I will not, therefore, decide whether Dr. Kaminsky has shown a prima facie case. I do this because the evidence on these issue is straightforward, and there are no genuine disputes about any of the material facts relating to legitimate reasons and pretext. This analysis shows that even if Dr. Kaminsky had made the required prima facie case, SLU would still be entitled to judgment as a matter of law.

The undisputed facts easily show that SLU had legitimate non-discriminatory reasons for its decision not to rehire Dr. Kaminsky. The affidavits of Drs. Vogler and Heaney articulate many reasons for the employment decision, and Dr. Kaminsky has presented no competent evidence to contest the material facts set out in those affidavits. As Dr. Vogler explained in her affidavit, SLU's hiring process is

governed by the Accreditation Counsel for Graduate Medical Education (ACGME) standards, which require participating institutions to select residency candidates based on "their preparedness, ability, aptitude, academic credentials, communication skills, and personal qualities such as motivation and integrity." SLU believed Dr. Kaminsky failed to meet these standards for both his 2005-2006 and 2006-2007 applications for a number of reasons, including his medical license suspensions, criminal conduct, incomplete and falsified applications, and his past unprofessional conduct at SLU, which included obscene phone calls and threatening letters to SLU staff.[3]

Since the undisputed factual record shows that SLU had legitimate, non-discriminatory reasons for not rehiring Dr. Kaminsky, I must then turn the record to see if there is any evidence to support Dr. Kaminsky's burden of demonstrating that these proffered reasons are a pretext for discrimination. Viewing the facts and inferences from the facts in the light most favorable to Dr. Kaminsky, I find no

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[3]The legitimate, non-discriminatory reasons provided by SLU for its failure to hire Dr. Kaminsky in 2005-2006 and 2006-2007 are identical with one exception. As will be explained in more detail later in this discussion, Dr. Vogler did not chose to hire Dr. Kaminsky in 2005-2006, in part, because she believed his Missouri medical license was suspended. By the time Dr. Kaminsky applied for the 2006-2007 program, Dr. Vogler no longer believed his Missouri medical license was suspended, and thus Dr. Vogler did not rely on this as a grounds for choosing not to hire him that year. This distinction makes little difference in my analysis, however, because the majority of the reasons SLU had for not hiring Dr. Kaminsky in 2006-2007 are the same as those that SLU relied on when it considered his 2005-2006 application.

evidence that creates a reasonable inference that his alleged disability or divorce was a determinative factor in SLU's decision not to hire him, nor do I find any evidence that could support an inference of pretext. There is a complete failure of proof of pretext.

As a general matter, Dr. Kaminsky has offered nothing, other his own speculation, to contest the validity or veracity of SLU's stated reasons for not hiring him. He concedes that at the time Dr. Vogler reviewed his 2005-2006 program application, both his Missouri and Illinois medical licenses were listed as suspended on the relevant state websites. All parties agree that the Missouri website was not accurate at that time, and that Dr. Kaminsky's Missouri license had indeed been reinstated on a probationary basis several months before his application was submitted. This error on the state website does not render Dr. Vogler's reliance on the information pretextual. It was not unreasonable for her to rely on the website, nor was it unreasonable for her to believe the information on the website over Dr. Kaminsky's contrary assertions in his application. This is especially true given that she knew some of his assertions in the application were false. In the end, the issue I must decide is not whether Dr. Vogler was correct in her assumptions, but whether she conducted a thorough investigation and made her decision reasonably and in good faith. Rodgers v. U.S. Bank, N.A., 417 F.3d 845, 855 (8th Cir. 2005). See

also Wheeler v. Aventis Pharmaceuticals, 360 F.3d 853, 859 (8th Cir. 2004) (explaining that the inquiry is not whether the employer's decision was correct or wise but only whether it was the real reason for the termination). The undisputed record shows that she made her decision reasonably and in good faith.

Dr. Kaminsky claims that Missouri and Illinois medical licenses are not prerequisites for admission in SLU's program. He argues that many medical school graduates apply for, and are accepted into, SLU's pathology residency training program without valid Missouri medical licenses. In her affidavit, Dr. Vogler conceded this point, but pointed out a crucial difference between Dr. Kaminsky's situation and the majority of those applicants who do not possess a valid medical license. She explained that an applicant who has never been licensed (e.g. a recent medical school graduate) is eligible for a position at SLU if the applicant could become licensed prior to beginning the program. An applicant with a suspended license, however, is ineligible because (1) his censure by a medical board demonstrates that he lacks the requisite qualities for admission, and (2) it is uncertain whether the suspension will be lifted prior to commencement of the residency program. Dr. Vogler, as the director of SLU's program, has personal knowledge of these policies, and Dr. Kaminsky has presented no evidence to suggest that her explanation is unworthy of credence.

Similarly, Dr. Kaminsky contends that Dr. Vogler's reliance on the status of his Illinois license was a cover for discrimination. In her affidavit, Dr. Vogler indicated that Dr. Kaminsky's Illinois suspension rendered him ineligible for SLU's program because an integral part of the residency program is a rotation in Illinois. Dr. Kaminsky disagrees, and argues that nay rotation in Illinois is elective, not required. Dr. Kaminsky offers no support for his position, just his own self-serving allegations. That, alone, is insufficient to contest Dr. Vogler's explanation. See Simpson, 425 F.3d at 543 ("[A] llegations and speculation are insufficient to survive summary judgment without facts to support them.") In sum, Dr. Kaminsky has failed to produce any evidence from which I can infer that Dr. Vogler's reliance on Dr. Kaminsky's license suspensions was unreasonable, pretextual, or otherwise suggestive of a discriminatory motive.

The same is true for the other legitimate, non-discriminatory reasons articulated by Dr. Vogler. Dr. Vogler also found Dr. Kaminsky ineligible for SLU's program because he failed to submit a complete and accurate application. Notably, Dr. Kaminsky failed to disclose his internship at Forest Park Hospital, his Illinois license suspension, and the real reason for his Missouri license suspension. Dr. Kaminsky did indicate in this application that he had a "Medical License Problem," but he listed that problem was a license suspension in Missouri "due to a mental

illness," not due to the Illinois criminal charges. Under the circumstances, it was entirely reasonable for Dr. Vogler to conclude that evasive, if not deceptive, answers in Dr. Kaminsky's application indicated that he did not meet the requisite qualities of integrity, honesty, and truthfulness that an applicant should have.

Dr. Vogler also concluded that Dr. Kaminsky's misdemeanor charges in Illinois made him ineligible for admission into SLU's program.[4] Dr. Kaminsky argues that because the application only asks for "Felony Convictions," SLU was not allowed to consider Dr. Kaminsky's misdemeanor convictions. Further, Dr. Kaminsky argues that SLU cannot hold his misdemeanor convictions against him because SLU's harassment and failure to diagnose his mental condition in 2000-2001 caused his criminal behavior. Both of these arguments are unavailing.

"The employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers." Hutson v. McDonnell Douglas Corp., 63 F3d 771, 781 (8th Cir. 1995). Thus, if SLU does not wish to hire an applicant because of that applicant's past misdemeanor charges - charges which the

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[4]Although the record establishes that Dr. Kaminsky was charged with felony drug charges in Missouri as well, Dr. Vogler did not know of these charges at the time she reviewed his 2005-2006 and 2006-2007 applications. These Missouri charges were only discovered in the course of discovery.

Missouri Board of Healing Arts found significant enough to justify a suspension of Dr. Kaminsky's medical license - SLU is entirely free to do so. There is no evidence that SLU's consideration of Dr. Kaminsky's misdemeanor charges was a departure from its normal practices, nor is there evidence that SLU has admitted other applicants with criminal histories similar to Dr. Kaminsky's. While the national form application only asked applicants to list felony convictions, this does not render the consideration of other criminal conduct discriminatory.

Dr. Kaminsky's arguments that all of his legal problems were the result of SLU's conduct toward him during his employment are not supported by any evidence, and are fanciful, if not frivolous. He argues that because SLU referred him to the EAP, it had a duty to diagnose and treat him, but there is no legal or evidentiary support for this either. Finally, he argues that the criminal acts he committed were a result of SLU's bad conduct toward him. The Illinois criminal acts - harassing a former girlfriend over the telephone and at her job, violating an order of protection, and threatening a witness - had no connection to his employment at SLU and cannot reasonably be said to have been "caused" by SLU's acts. Dr. Kaminsky's speculation that all his problems are because SLU did not like him because of his divorce is just that - pure speculation. Dr. Kaminsky cannot

somehow pass the blame for his criminal conduct at SLU.

Finally, Dr. Vogler found that Dr. Kaminsky's past unprofessional conduct towards her and her staff rendered him ineligible for further pathology residency training at SLU. Dr. Kaminsky admits that he was aggressive around SLU's staff during his previous enrollment. He also admits that some employees at SLU may be "scared" of him. Nevertheless, he contends that his previous conduct is not a legitimate basis on which to deny him re-admission into SLU's program because his behavior "was actually caused, amplified and perpetuated" by SLU. Dr. Kaminsky believes that his unprofessional behavior at SLU was nothing more than self-defense against the oppressive and abusive environment that Dr. Vogler and her staff had created for him. Once again, there is simply no support for this claim, just as there is no requirement that an employer rehire an employee who has demonstrated the lack of professionalism shown here. Regardless of "who started it," Dr. Kaminsky does not dispute the fact that he made intimidating and harassing phone calls to Dr. Vogler, Dr. Heaney, and their staffs, and sent threatening letters to them. Dr. Vogler was entirely reasonable to conclude that such conduct does not demonstrate the requisite personal qualities to be eligible for re-admission into SLU's residency program.

In the end, although Dr. Kaminsky has meticulously attacked each of Dr.

Vogler's stated reasons for her decision not to hire Dr. Kaminsky for the 2005-2006 and 2006-2007 programs, his arguments fall far short of establishing pretext. His entire theory of pretext rests on his own speculation that Dr. Vogler has been out to get him since the day she discovered that he was seeking a divorce. He claims that Dr. Vogler's harsh treatment triggered the onset of a mental illness that caused him to be aggressive and commit crimes. He cannot discredit Dr. Vogler's stated reasons for her decision not to hire him with speculation alone. See Simpson, 425 F.3d at 543. Because he had failed to present facts which might suggest that Dr. Vogler's actions were based on anything other than her proffered reasons, I will grant summary judgment in favor of SLU on Dr. Kaminsky's disability and religious discrimination claims.

2. Retaliation

Dr. Kaminsky also contends that SLU retaliated against him in response to his stated intent to file a charge of discrimination. To make a prima facie case of retaliation, Dr. Kaminsky must show that (1) he engaged in a protected activity; (2) he suffered an adverse employment action; and (3) a casual connection exists between (1) and (2). Box v. Principi, 442 F.3d 692, 696 (8th Cir. 2006). SLU contends that Dr. Kaminsky's retaliation claim fails because he cannot establish that anyone knew about his intent to file a charge of discrimination. I agree, and

will grant summary judgment in favor of SLU on this claim.

For a casual nexus to exist between Dr. Kaminsky's stated intent to file a charge of discrimination and St. Elizabeth's decision not to interview him, SLU decision-makers must have known of Dr. Kaminsky's intent to file a charge of discrimination before they took any action to interfere with his interview at St. Elizabeth's. Robinson c. Potter, 435 F.3d 990 (8th Cir. 2006)(decision-makers must be aware of protected activity); see also Smith v. Riceland Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995) (stating that a plaintiff must show that "the employer had actual or constructive knowledge of the protected conduct" in order to establish a prima facie case of retaliation), and Wolff v. Berkely, Inc., 938 F.2d 100, 103 (8th Cir. 1991)(stating that a casual link between statutorily protected activity and an adverse employment action "does not exist if the employer is not aware of the employee's statutorily protected activity")).

Dr. Kaminsky's retaliation claim rests on a series of conversations that he says took place between Mr. Bondurant, Ms. McCarthy, and Dr. Robacker on March 15, 2005. According to Dr. Kaminsky, he first informed Mr. Bondurant of his intent to file a charge of discrimination against SLU. Dr. Kaminsky alleges that Mr. Bondurant then relayed this information to Ms. McCarthy, who then contacted

Dr. Robacker and influenced him not to interview Dr. Kaminsky. On the morning of March 16, Mr. Robacker's office contacted Dr. Kaminsky to cancel his interview. If each of these allegations were true, Dr. Kaminsky might be able to make out a prima facie case of retaliation. Dr. Kaminsky, however, has failed to present any evidence from which I can reasonably infer that these conversations took place.

The undisputed record establishes that Dr. Kaminsky and Mr. Bondurant spoke on March 15, 2005, and that Dr. Kaminsky informed Mr. Bondurant that he intended to file a charge of discrimination against SLU. The undisputed record also establishes that Mr. Robacker's office cancelled Dr. Kaminsky's interview the next morning. Admittedly, if Dr. Kaminsky could demonstrate that SLU knew about his intent to file a charge of discrimination, the temporal proximity of these two events might suggest a causal relationship. See Clark County School Dist. v. Breeden, 532 U.S. 268, 273 (2001) (referencing cases which accept mere temporal proximity as sufficient to show the causality necessary for a prima facie case). Coincidental timing, however, is rarely sufficient to establish a prima facie case of retaliation. Kipp v. Missouri Highway and Transp. Com'n, 280 F.3d 893, 897 (8th Cir. 2002) (citations omitted). That is especially true where, as here, the plaintiff has failed to present any evidence to demonstrate that the employer had knowledge of the

protected conduct. There is no evidence that Mr. Bondurant contacted anyone at SLU on March 15, 2005 to share the information regarding Dr. Kaminsky's intent to file a charge of discrimination. Indeed, Dr. Vogler, Dr. Heaney, Ms. McCarthy, and Mr. Bondurant have all testified that no such conversation took place. Dr. Vogler, Dr. Heaney, and Ms. McCarthy also stated that they did not know of Dr. Kaminsky's intent to file a charge of discrimination until this lawsuit was filed. Although the Court must view all facts and inferences from those facts in a light most favorable to Dr. Kaminsky, that does not mean that I will speculate that all these witnesses are lying just because Dr. Kaminsky believes they are. Dr. Kaminsky has provided no evidence to support his allegations, and the witnesses' testimony is uncontested.

Further, even if SLU did know of Dr. Kaminsky's plan to file a charge of discrimination, there is no evidence that anyone at SLU contacted Dr. Robacker to persuade him not to hire Dr. Kaminsky. Dr. Kaminsky says that Dr. Robacker's coordinator told him that she was certain that a call from SLU resulted in the cancellation of his interview. Dr. Kaminsky has not supported this allegation with any non-hearsay evidence, however, and I cannot infer that Dr. Kaminsky's allegations are true simply because Dr. Robacker and his staff did not respond to Dr. Kaminsky's request for the production of documents.

withstand summary judgment. He cannot simply rely on self-serving allegations and speculation.

To the extent that Dr. Kaminsky claims retaliation based on SLU's failure to hire him into its 2006-2007 program, this claim must also fail. Dr. Kaminsky has failed to present any facts to support such a claim, other than the fact that he filed a charge of discrimination in April, 2005, and was not hired by SLU the following fall. Even if this were sufficient to make out a prima facie case of retaliation, he cannot show that SLU's legitimate reasons for this decision are a pretext for discrimination, as I discussed at length above. See Zhaung v. Datacard Corp., 414 F.3d 849, 857 (8th Cir. 2005) (applying the burden-shifting framework to a retaliation claim).

Conclusion

Because Dr. Kaminsky has failed to present any evidence from which I can infer that any of SLU's stated reasons for its decision not to hire Dr. Kaminsky are a pretext for discrimination, I will grant SLU's motion for summary judgment as to Dr. Kaminsky's disability and religious discrimination claims. Additionally, I will grant SLU's motion for summary judgment as to Dr. Kaminsky's retaliation claims because he failed to present any evidence to suggest that SLU knew of his intent to file a charge of discrimination of influenced St. Elizabeth's decision not to interview

Dr. Kaminsky points to a page of notes taken by his counselor at Chestnut Health Systems in May, 2005, as support for his retaliation claim. Dr. Kaminsky contends that these notes corroborate his allegations, but I disagree. These notes simply refer to the fact that Dr. Kaminsky told the counselor that Mr. Bondurant was upset with Dr. Kaminsky for filing a charge of discrimination with the EEOC. The counselor's notes do no indicate that Mr. Bondurant spoke with anyone at SLU regarding the charge of discrimination, nor do they establish that Mr. Bondurant knew that Dr. Kaminsky had applied to St. Elizabeth's Hospital for a family medicine residency. They do not indicate that anyone at SLU influenced Dr. Robacker's decision not to interview Dr. Kaminsky. Most importantly, of course, they are simply the counselor's notes of what Dr. Kaminsky himself told her, and as such they are no better evidence than the other statements of unsupported speculation that Dr. Kaminsky has made to the court.

In sum, Dr. Kaminsky's retaliation claim is sound in theory, but not in fact. He has produced no evidence from which I can reasonably infer that the cancellation of his interview at St. Elizabeth's was orchestrated by SLU in retaliation for his stated intention to file an EEOC charge. Once SLU has pointed to an absence of evidence on an essential element of his claim, Dr. Kaminsky bears the burden of producing enough evidence to show that there is a genuine factual dispute if he is to

him.

I have no doubt that Dr. Kaminsky believes the things he has alleged here. I also have no doubt that he suffers from some form of mental illness, although I need no decide whether this is a disability as defined by the ADA. The medical records produced indicated that the mental illness has been well-controlled with appropriate medication in the past. Dr. Kaminsky testified in his deposition that he has not taken medication for more than a year, and his filings in this case show a pattern of irrational thought that appears consistent with the medical evidence in the record. His lack of medication may indicate that his illness, whatever it is, is not presently under control, and that may be part of the reason that he believes the allegations he has made here. His own beliefs, however, are not evidence, and sincerity of belief, without evidence, is not sufficient to withstand summary judgment.

Accordingly,

IT IS HEREBY ORDERED that defendant Saint Louis University School of Medicine's motion for summary judgment [# 100] is granted.

A separate judgment in accord with this Memorandum and Order is entered this same date.

s/ Catherine D Perry
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 16th day of August, 2006.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-3139

Richard Anthony Kaminsky, also known as Richard Anthony Kaminsky, D.O., also known as Dr. Richard Anthony Kaminsky,

Appellant

v.

Saint Louis University School of Medicine,

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:05-cv-1112-CDP)

ORDER

The petition for rehearing by the panel filed by appellant has been considered by the court and is denied.

July 03, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals. Eighth Circuit.

s/ Michael E. Gans